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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERT CHICO RAMIREZ et al.,

Defendants and Appellants.

D076540

(Super. Ct. No. BAF1500267)

APPEALS from judgments of the Superior Court of Riverside County, Bernard J. Schwartz, Judge. Affirmed as to Albert Chico Ramirez; remanded with directions as to Ricardo Jesus Ramirez.

William J. Capriola, by appointment of the Court of Appeal, for Defendant and Appellant Albert Chico Ramirez.

Law Offices of Beles and Beles, Robert J. Beles and Joseph Lanting Ryan for Defendant and Appellant Ricardo Jesus Ramirez.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Seth Matthew Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

Following a joint trial, a jury convicted Albert Chico Ramirez and Ricardo Jesus Ramirez<sup>1</sup> of gang related crimes. The jury learned that two shooting incidents occurred within a few hours of each other in April 2015; during the first incident, a victim was killed, and during the second incident, a victim was shot but survived. Evidence showed that Chico used the same firearm both times, and Ricardo, who was with Chico during the second incident, attempted to dissuade a witness from reporting it to law enforcement by threat of force or violence (Pen. Code,<sup>2</sup> § 136.1, subds. (b)(1) & (c)(1)). Ricardo also had a prior serious felony conviction for which the trial court imposed a five-year sentencing enhancement (§ 667, subd. (a)).

On appeal, Chico challenges the sufficiency of evidence to support his conviction for first degree premeditated murder (as to the first incident) as well as a gang enhancement on his attempted murder conviction (as to the second incident). Ricardo contends the trial court erroneously denied his pretrial motion to sever his trial from Chico's. He also challenges the sufficiency of evidence to support his conviction for dissuading a witness. Finally, he argues he is entitled to retroactive application of Senate Bill No. 1393, which became effective on January 1, 2019 and allows for trial court discretion to strike a prior serious felony enhancement in furtherance of justice.

For reasons we discuss, we are unpersuaded by defendants' contentions on appeal except for Ricardo's argument regarding Senate Bill No. 1393.

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<sup>1</sup> Although there is no family relation, the defendants have the same last name. For clarity, we refer to Albert Chico Ramirez as Chico, which is how he is frequently referred to in the record, and Ricardo Jesus Ramirez as Ricardo.

<sup>2</sup> Further unspecified statutory references are to the Penal Code.

Accordingly, the judgments are affirmed except that Ricardo's case is remanded for the limited purpose of allowing the trial court to consider whether to strike his prior serious felony enhancement.

## FACTUAL AND PROCEDURAL BACKGROUND

### *Background: Gang Membership*

Chico and Ricardo were both members of Southside Criminals (SSC), a Hemet-based street gang that identified itself by various means, including tattoos, hand signs, and blue-colored items. SSC members routinely engaged in criminal acts within their territory, including vandalism, assault, theft, robbery, weapons possession, drug sales, attempted murder, and murder.

To perpetrate its criminal activities, SSC adhered to certain tenets; stricter adherence earned members greater respect. SSC members identified their gang affiliation to promote their criminal activities as well as instill fear in others. They committed crimes together and protected each other, through more criminal activity if necessary. Similarly, SSC members were expected to remove threats to their criminal enterprise, such as by intimidating witnesses. "Snitches," or informants, were particularly loathsome to the gang because they directly threatened its ability to commit crimes undetected. An SSC member was expected to violently retaliate against a known snitch if presented with the opportunity, or else risk being a subject of retaliation himself.

### *First Incident: Shooting of John M.*

Around 10:00 p.m. on April 20, 2015, a driver noticed a body lying on the side of an unilluminated part of Oakland Street in Hemet. The driver reported an emergency. The victim, John M., was a former or current member of SSC, and Chico had known him since they were children.

Although unconscious without a pulse, John's body exhibited no signs of lividity. He was unarmed and lay in the dirt on his back with a lighter in his hand. A drink from Del Taco sat in the street nearby and showed signs of recent condensation. Emergency responders immediately initiated resuscitative efforts, but soon discovered John had been shot. Shortly thereafter, he was pronounced dead from a bullet that entered through his back on the left side and fragmented in his chest, damaging multiple vital organs.<sup>3</sup> The bullet was shot from a rifle that was later identified as belonging to Chico.

*Second Incident: Shooting of Paul A.*

Adam H. witnessed the second shooting incident several hours later. He was hanging out with his neighbor, Whisper, in Adam's aunt's garage on Oleander Street about two miles from the scene of the first shooting. Adam asked Whisper to get some methamphetamine. Whisper walked Adam out to the street where Whisper's friends were sitting in a parked, white sport utility vehicle (SUV).

Chico sat in the driver's seat of the white SUV. Ricardo sat in the front passenger seat, and a woman with face tattoos sat in the back. Adam had never met these people before. Chico had a visible, distinctive "SSC" tattoo on his head.

Adam paid Chico \$20 for the drugs, and Chico asked if Adam wanted to smoke with him. Adam agreed, he got in the backseat on the driver side, and

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<sup>3</sup> John also suffered a through-and-through wound to his upper left arm. The medical examiner could not say with certainty whether a single bullet caused both the arm wound and the fatal torso wound.

Whisper got in the backseat on the passenger side. Everyone started smoking.<sup>4</sup>

In the car, Chico and Ricardo indicated their SSC gang affiliation through hand gestures and signs. Chico said he was “SSC.” They talked about trying to “‘hit licks’” and “‘come up,’” i.e., find property to steal. At one point Whisper grew uncomfortable and abruptly left the car. Chico and Ricardo followed him and beat him up. They returned to the car without Whisper, and Chico began driving around the area looking for something to steal. Having seen what happened to Whisper, Adam was scared.

Around 2:30 a.m., Chico and Ricardo spotted something they could take—two all-terrain vehicles (quads) in the driveway of victim Paul A.’s house on Cypress Street. Chico circled around and eventually stopped in front of Paul’s house. Meanwhile, Paul happened to be driving home in his Chevy truck and noticed the white SUV circling the neighborhood and finally parking in front of his house. Paul stopped his truck behind the white SUV.

At that point, Chico decided to drive away toward a nearby park, but Paul followed in his Chevy to see what the people in the SUV were doing. Chico soon pulled over to the right with his driver side window rolled down, and Paul pulled up alongside to the left. Paul rolled down his passenger side

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<sup>4</sup> At trial, the man known as Whisper, the tattooed woman, and another woman who had information about the night of the shootings, were called to the stand and refused to testify against defendants. They were accordingly held in contempt of court. Adam testified in exchange for immunity from prosecution for his actions that evening.

window, looked out, and began asking the driver what he was doing.<sup>5</sup> Paul was unarmed and did not know the people in the SUV.

In the SUV, Chico had a verbal exchange with Ricardo. Ricardo said, “Don’t kill him,” and Chico responded to the effect of, “Give him 20.”<sup>6</sup> Chico pulled out a .223-caliber sawed-off rifle (the rifle) with a blue bandanna around it and fired at Paul, hitting him in the arm and chest. Paul was seriously wounded but survived. He identified Chico as the shooter, Ricardo as the front seat passenger, and confirmed that there were several individuals in the white SUV.

*The Aftermath: Witness Intimidation*

After the shooting, as he sped back toward Adam’s aunt’s house, Chico tried to gauge Adam’s reaction to what he had just seen. “You cool?” Chico asked. He added, “Don’t play me,” “I’ll kill you for real,” and “Don’t fuck with me.” Ricardo offered a warning: “[H]e’s the type if -- if he [(Chico)] thinks someone is going to go to the cops, that he’ll kill ‘em [*sic*].” Based on everything that had happened, Adam believed both Chico and Ricardo were threatening to kill him.

On arriving at Adam’s aunt’s house, the original trio from the SUV followed Adam into the garage. They hung out for a while before leaving. It was by then nearing sunrise.

Later that day, while Adam was away from his aunt’s house, he received a phone call from Chico’s cell phone number and recognized the voice

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<sup>5</sup> Paul believed the white SUV had been following him and said he was trying to find out why. According to Adam, Paul asked Chico why he had been parked in his driveway.

<sup>6</sup> When asked, Adam did not know what Chico meant by saying, “Give him 20.”

on the line as the tattooed woman from the SUV. Adam understood from the call that the trio from the SUV had returned to his aunt's house. Not long thereafter, Adam's aunt noticed her television was missing, and she called police to report the theft. Adam returned to his aunt's house that evening to find officers there. He provided them with information about the shooting he had witnessed.

### *Police Investigation and Interviews*

Chico sometimes stayed and stored his belongings at his sister's house. A few days after the shootings, officers obtained a warrant to search the house and discovered the rifle hidden in a closet. Chico's sister confirmed that the rifle did not belong to her and that Chico had accessed her closet a day earlier. The rifle's sawed-off stock was located in the garage. Chico's palm print was found on the rifle. Further, ballistics testing of bullet fragments from John's body showed that the bullet was fired from the rifle.

The police also spoke to Chico's sister's boyfriend. The boyfriend saw Chico at the house with the rifle about two weeks before the shootings. After the shootings, Chico tried to sell the boyfriend a television. Both Chico's sister and her boyfriend saw Chico being picked up and dropped off in a white SUV prior to the shootings.

On April 25, an officer stopped a vehicle that Ricardo was riding in. He was sitting in the front passenger seat. The officer found a blue bandanna, a shotgun (the shotgun), and shotgun shells in the passenger side compartment of the vehicle. This evidence formed the basis for a separate weapons possession charge against Ricardo.

Detectives also conducted a recorded video interview of Chico, during which he made incriminating statements about the night of the shootings, the rifle, and his relationship with John. Regarding the shootings, Chico first

said he was with his girlfriend the whole night, then allowed that he might have gone to Del Taco, and ultimately admitted he had been cruising around in a white SUV and was chased by a big truck. As to the rifle, Chico first unequivocally denied it was his. He eventually stated he had a gun that *looked* just like the rifle, but not the rifle itself, and he threw the “whole different gun” away the day after the shootings. Chico finally admitted the rifle was his but claimed to have only bought it that morning of the interview from a “black guy.”

During the same interview, Chico told police that John was “SSC,” a “homie,” and a “very good friend,” but nonetheless, Chico “didn’t associate with [John] no more because he was no good.” Chico had heard that John “told on somebody.” As a result, Chico was aware that John had gone into protective custody (PC) while they were both in prison.<sup>7</sup> Chico acknowledged that gang members get in trouble by going in PC.

### *Trial Proceedings*

Defendants were charged in a single information containing six counts as follows: Chico was charged with (1) murdering John (§ 187, subd. (a)), (2) attempting to murder Paul (§ 664, 187, subd. (a)), and (3) being a felon in possession of a firearm, specifically the rifle (§ 29800, subd. (a)(1)). Counts 1 and 2 each alleged gang enhancements (§ 186.22, subd. (b)(1)(C) & (b)(5)) and personal-discharge-of-firearm enhancements causing death or great bodily injury (§ 12022.53, subd. (d)). Count 4 charged both Chico and Ricardo with dissuading a witness by means of force or threat of force (§ 136.1, subds. (b)(1) & (c)(1)), and alleged a gang enhancement (§ 186.22, subd. (b)(4)(C)). Count 5 charged both Chico and Ricardo with active gang participation

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<sup>7</sup> Individuals in protective custody are housed separately from the general prison population.



(§ 186.22, subd. (a)). Count 6 charged Ricardo with being a felon in possession of a firearm, specifically the shotgun (§ 29800, subd. (a)(1)).<sup>8</sup> The operative information additionally alleged that Chico had two prison priors (§ 667.5 subd. (b)) and that Ricardo had a serious felony prior (§ 667, subd. (a)) and a strike prior (§ 667, subds. (c), (e)(1)).

Ricardo filed an unsuccessful pretrial motion to sever his trial from Chico's. At the joint trial, the People called Investigator David Hankins as an expert on criminal street gangs. He testified that SSC claimed as gang territory the areas surrounding the crime scenes on Oakland and Cypress Streets. He also provided a detailed explanation of the gang's signs, culture, and principles. In his experience, calling a gang member "no good" was street terminology for a "snitch . . . somebody you can't trust." Hankins indicated that a snitch goes into PC for his own protection because he would otherwise be a target of violent retaliation.

Based on various pieces of evidence, Hankins testified that defendants were active participants in SSC in April 2015—a point uncontested on appeal. Furthermore, based on hypothetical facts paralleling the evidence presented at trial, he offered his opinion that the charged crimes were committed for the benefit of, or in association with, a gang.

The jury convicted defendants of all charged crimes and determined the alleged gang and firearm enhancements were true. Additionally, the jury found that John's killing was first degree murder, i.e., that Chico acted willfully, deliberately, and with premeditation. Chico admitted his prison priors. Separately, the court made true findings on Ricardo's alleged priors.

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<sup>8</sup> Both defendants stipulated during trial to having "previously been convicted of a felony," conclusively establishing that element of the possession crimes.

The trial court sentenced Chico to a total prison term of 99 years to life. Ricardo was sentenced to a term of 23 years to life in prison, comprised of 14 years to life on count 4, four years on count 6, and five years for his prior serious felony conviction. Ricardo's sentence on count 5 was stayed under section 654.

## DISCUSSION

Each defendant raises distinct claims of error. We address Chico's arguments first, followed by Ricardo's.

### I. *Chico's Contentions*

#### A. *Substantial Evidence Supports Chico's Murder Conviction*

Chico contends that there is insufficient evidence to support his murder conviction. He argues the People did not establish the issue of "identity" beyond a reasonable doubt, i.e., that *he* was the one who killed John. Chico acknowledges the evidence indicates he *could have been* the shooter, but asserts that others, like Ricardo or the tattooed woman, might also have fired the fatal round.

"When the sufficiency of the evidence to support a conviction is challenged on appeal, we review the entire record in the light most favorable to the judgment to determine whether it contains evidence that is reasonable, credible, and of solid value from which a trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] Our review must presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] Even where, as here, the evidence of guilt is largely circumstantial, our task is not to resolve credibility issues or evidentiary conflicts, nor is it to inquire whether the evidence might reasonably be reconciled with the defendant's innocence. [Citations.] It is the duty of the jury to acquit the defendant if it finds the

circumstantial evidence is susceptible to two interpretations, one of which suggests guilt and the other innocence. [Citation.] But the relevant inquiry on appeal is whether, in light of all the evidence, ‘*any* reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.’” (*People v. Zaragoza* (2016) 1 Cal.5th 21, 44 [affirming conviction based on entirely circumstantial evidence that defendant was shooter].)

Here, substantial circumstantial evidence supports a conclusion that Chico shot and killed John. Forensic analysis and ballistics evidence showed that John was killed by a bullet fired from the rifle, and witness and fingerprint evidence established that the rifle was very recently fired by Chico. (See *People v. Young* (2005) 34 Cal.4th 1149, 1180 (*Young*) [expert’s ballistics testimony strongly suggested that the gun used to shoot one victim also killed a different victim and was thus evidence of identity]; *People v. Gardner* (1969) 71 Cal.2d 843, 849 [“Fingerprint evidence is the strongest evidence of identity”].)

Moreover, there is abundant evidence that the rifle belonged to Chico. He was seen in possession of it before the shooting, and multiple witnesses saw him with it a few hours after John’s shooting. Chico then hid the rifle at the house where he was staying. At one point, he admitted the rifle was his, but claimed he purchased it after the shootings. Notably, Chico did not ever indicate that another member of SSC had given him the rifle or that he was storing it for someone else.

Other post-crime evidence supports Chico’s identity as the killer. He made up outrageous stories about where the rifle came from. He provided inconsistent statements on his whereabouts the night of John’s death. He first minimized his relationship with John, but then admitted John was “basically family.” Chico’s attempt to conceal the murder weapon as well as

his misleading statements to law enforcement compellingly pointed to consciousness of guilt. (*People v. Thomas* (1992) 2 Cal.4th 489, 515 [jury could infer defendant was lying to conceal guilt based on his inconsistent descriptions of his activities on the night of the killings].)

In addition, the jury could reasonably infer that Chico had a motive to kill John. Chico's loyalty to his gang was undeniable. He had "SSC" prominently tattooed on his head. Based on his own admissions, Chico had been very good friends with John, and they grew up together in SSC. Chico came to learn, however, that his longtime "homie" had snitched on the gang and gone into PC. Given these facts, the jury could reasonably infer that Chico viewed John's conduct as necessitating or deserving of violent retribution. "[E]vidence of motive to commit an offense is evidence of the identity of the offender." (*People v. Daniels* (1971) 16 Cal.App.3d 36, 46.)

It should go without saying that the timing and proximity of shooting incidents also supports Chico's identity as the shooter. It would be unusual for someone other than Chico to have shot his longtime friend John, and then for Chico to use the very same gun a few hours later to shoot Paul.

Accordingly, we conclude the record contains substantial evidence from which a trier of fact could find Chico guilty of murder beyond a reasonable doubt. The People were not required to introduce evidence that completely eliminated any other possible suspect.

B. *Substantial Evidence Supports the Finding that Chico Acted with Premeditation and Deliberation*

Even if there is enough evidence that he was the shooter, Chico argues there is insufficient evidence of premeditation and deliberation to support a first degree murder verdict. "A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill. [Citation.]

‘Deliberation’ refers to careful weighing of considerations in forming a course of action; ‘premeditation’ means thought over in advance. [Citations.] ‘The process of premeditation does not require any extended period of time. “The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . .” ’” (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080 (*Koontz*).)

“*People v. Anderson* (1968) 70 Cal.2d 15, sets the guidelines for reviewing findings of first degree murder based on premeditation and deliberation. [Citation.] We refer to three types of evidence: (1) facts about a defendant’s behavior before the killing that show prior *planning* of it; (2) facts about any prior relationship between the defendant and that victim from which the jury could infer a  *motive*; and (3) facts about the *manner* of the killing from which the jury could infer that the defendant intentionally killed the victim according to a preconceived plan. [Citations.]” (*People v. Bloyd* (1987) 43 Cal.3d 333, 347-348.) “The court will uphold verdicts whenever there is (1) ‘extremely strong evidence’ of planning; or (2) evidence of motive in conjunction with either (a) evidence of planning or (b) evidence of a manner of killing showing that the killer must have had a preconceived design.” (*Id.* at p. 348, citing *Anderson*, at p. 27.)

“[T]he *Anderson* guidelines are descriptive, not normative. ‘The *Anderson* factors, while helpful for purposes of review, are not a sine qua non to finding first degree premeditated murder, nor are they exclusive.’ ” (*Koontz, supra*, 27 Cal.4th at p. 1081.) Under a review for substantial evidence, “ ‘[a]n appellate court must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise.’ ” (*People v. Halvorsen* (2007) 42 Cal.4th 379, 419.)

The shooting of John reflected all three *Anderson* factors. Drawing all logical inferences in support of the judgment, we conclude a reasonable trier of fact could find beyond a reasonable doubt that Chico deliberated and premeditated John's killing. (*People v. Perez* (1992) 2 Cal.4th 1117, 1125-1126 [*Anderson* factors are not to be applied rigidly but as an "aid" in assessing whether the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse].)

As previously discussed in section A., Chico had a motive to kill John based on gang-related retaliation. Given Chico's high level of commitment to SSC and his close childhood ties to John ("basically family"), the jury could reasonably infer that Chico felt deeply betrayed by John's snitching and a strong desire to personally deliver retribution.<sup>9</sup> To that end, the jury could further draw the reasonable inference that Chico had a standing plan to kill John when the opportunity arose. The duo had a preexisting conflict. When they were incarcerated at the same time, Chico was aware that John had gone into PC due to snitching. Since then, Chico had not been associating with John by his own admission, and, Chico had only recently gotten out of jail.

Consistent with a plan or preconceived design to kill, Chico obtained the murder weapon at least two weeks prior to the shooting. The location of the attack also suggests that Chico gave it prior thought. John had no immediate means of escape where he was killed; he was on foot at the time;

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<sup>9</sup> Whether out of fear or some other reason, the jury observed that multiple witnesses were subpoenaed by the prosecution yet refused to testify against defendants at trial. These witnesses chose instead to be held in contempt of court orders, lending credence to the gang expert's testimony regarding snitches.

and he was shot in an unlit portion of the street, making it more difficult to identify the perpetrator.

As to manner of killing, there were no signs of struggle or provocation, and Chico shot John in the back in a sufficiently exacting manner, suggestive of premeditation. (*People v. Gonzales & Soliz* (2011) 52 Cal.4th 254, 295 [in gang-motivated retaliation killing, close-range shooting without any provocation or evidence of a struggle supports an inference of premeditation and deliberation]). And though a minor consideration, Chico's demeanor a few hours after the killing was calm and collected. In fact, he went on to deliberately shoot someone else.

We are satisfied the evidence reasonably justified the jury's finding that Chico formed and acted on a deliberate plan to kill.

C. *Sufficient Evidence Supports the Gang Enhancement on the Attempted Murder Conviction*

Chico contends there is insufficient evidence to support the gang enhancement (§ 186.22, subd. (b)(1)) on count 2, his attempt to murder Paul. Section 186.22, subdivision (b)(1), provides: “[A]ny person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the *specific intent to promote, further, or assist in any criminal conduct by gang members*, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished. . . .” (Italics added.) Chico focuses on the second prong of the statute, arguing there is insufficient evidence of specific intent.

“[T]he scienter requirement in section 186.22 [subdivision] (b)(1)—i.e., ‘the specific intent to promote, further, or assist in any criminal conduct by gang members’—is unambiguous and applies to *any* criminal conduct,”

including the underlying felony to be enhanced. (*People v. Albillar* (2010) 51 Cal.4th 47, 66 (*Albillar*).) The evidence need not establish a particular crime the defendant intended to assist a gang member in committing. (*People v. Vazquez* (2009) 178 Cal.App.4th 347, 353 [charged murder could have assisted “the [charged] murder itself and many other crimes regularly committed by [the gang’s] members”].) “In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence . . . from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence.” (*Albillar, supra*, 51 Cal.4th at pp. 59-60.)

Here, it is undisputed Chico and Ricardo were active members of SSC. The gang expert testified to crimes that SSC members routinely committed within the gang’s claimed territory, including assault, theft, robbery, weapons possession, drug sales, and attempted murder. On the night of Paul’s shooting as they sat in the white SUV, defendants made the gang’s hand signals and Chico specifically identified his gang affiliation. They were selling drugs and looking for property to steal together. When Whisper was reluctant to participate, defendants beat him up. The jury could reasonably infer that Chico and Ricardo were on a gang-related criminal excursion when they encountered Paul.

By all indications, Paul inadvertently stumbled on SSC’s criminal activities. He observed defendants’ suspicious behavior and decided to follow them. The jury could reasonably infer that Chico shot Paul because Paul was interfering with the gang members’ criminal conduct, even if unwittingly. Contrary to Chico’s assertion on appeal, it was not necessary for Paul to



recognize Chico as a “gang member.” The evidence suffices to support the jury’s finding that, when Chico committed the shooting, he was specifically intending to promote, further, or assist his own and his cohort’s gang-related criminal conduct. (§ 186.22, subd. (b)(1).)

Chico argues we should follow *In re Daniel C.* (2011) 195 Cal.App.4th 1350 (*Daniel C.*), where the Court of Appeal reversed the juvenile court’s true finding on a gang enhancement (§ 186.22, subd. (b)(1)(C)). (*Daniel C.*, at pp. 1357, 1365.) In that robbery case, juvenile Daniel, who was not himself “an actual gang member,” entered a grocery store with two gang members/affiliates. (*Id.* at p. 1357.) The two gang members left the store, and Daniel remained inside. He then, on his own, attempted to steal a bottle of alcohol and hastily assaulted the store manager in the process. (*Id.* at pp. 1353-1355, 1357.) The appellate court concluded that Daniel committed the robbery “in association with” a gang because he was accompanied by known gang members when he entered the grocery store. (*Id.* at pp. 1358-1359.) However, the court held there was insufficient evidence of Daniel’s specific intent to “promote, further, or assist in any criminal conduct by gang members.” (*Id.* at pp. 1360, 1364.) Daniel himself was “not a gang member.” (*Id.* at p. 1362.) Additionally, his “companions left the store before [Daniel] picked up the liquor bottle, and they did not assist him in assaulting [the manager].” (*Id.* at p. 1361.) Thus, the court was not persuaded Daniel had the specific intent to assist in criminal conduct by *gang members*. (*Id.* at p. 1362.)

This case is distinguishable from *Daniel C.* Unlike Daniel, Chico and Ricardo were both established gang members. The gang expert’s testimony permissibly informed the jury of SSC’s pattern of criminal activities within gang territory. As we have noted, the jury could reasonably infer that

defendants were engaged in criminal conduct together (looking for something to steal) prior to their run-in with Paul, and that Chico subsequently shot Paul to promote, further, or assist that criminal conduct. (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 [specific intent to assist the *gang* is not required, only “ ‘any criminal conduct by gang members’ ”]; cf. *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1196 [gang member’s carrying a knife for own protection does not suffice by itself to meet specific intent prong of gang enhancement statute].) We find no basis to reverse the gang enhancement on count 2.

## II. *Ricardo’s Contentions*

### A. *The Trial Court Did Not Abuse Its Discretion in Declining to Sever Defendants’ Trials*

Ricardo argues the trial court erred in refusing to sever his trial from Chico’s, and that the error amounted to a denial of his due process right to a fair trial. We provide further background and analysis below.

#### 1. *Supplemental Background*

Ricardo filed a motion in limine to sever his trial from Chico’s under section 1098. The motion argued that “the nature of the charges faced by defendants . . . are sufficiently different and unrelated so as to cause blatant and obvious prejudicial association . . . .” Specifically, Ricardo argued that the jury would find him guilty based merely on his association with Chico; his codefendant faced far more serious charges; and there was “scant” admissible evidence against Ricardo alone. Ricardo’s counsel reinforced these points at oral argument.

The People opposed the motion to sever, arguing the strong legislative preference for joint trials when defendants are jointly charged as they were in counts 4 and 5; the overlap in evidence to establish common charges, e.g., all

evidence relating to the second shooting incident and gang participation; lack of confusion given the few, clear charges against Ricardo; and the appropriate use of jury instructions to minimize prejudice. Chico did not join or oppose the motion.

After considering the parties' arguments, the court denied Ricardo's motion. The trial judge initially believed Ricardo was in the SUV during both shooting incidents. Counsel clarified that the evidence did not show Ricardo was present during the first incident involving John. With a corrected understanding of the facts, the court nonetheless found that a joint trial was appropriate based on the efficiencies to be gained; joint charges requiring presentation of evidence relating to the second incident against both defendants; and other available measures to minimize the potential prejudice to Ricardo, such as redactions and instructions relating to Chico's statements to law enforcement.<sup>10</sup> Likewise, the court found no need for a second jury.

After these pretrial rulings, Ricardo did not renew his request for a severance or a separate jury.

## 2. *Analysis*

"The Legislature has expressed a preference for joint trials; therefore, two or more defendants jointly charged with crimes must be tried together unless the court orders separate trials. [Citations.] Joint trials promote efficiency and help avoid inconsistent verdicts. [Citations.] '[I]mportant concerns of public policy are served if a single jury is given a full and fair overview of the defendants' joint conduct and the assertions they make to defend against [the] ensuing charges.' [Citation.] The court has discretion to order separate trials if there is an incriminating confession, prejudicial

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<sup>10</sup> All parties agreed that the prosecution's redactions to Chico's statements eliminated any reference to Ricardo.

association, likely confusion due to evidence on multiple counts, conflicting defenses, or the possibility that a codefendant might provide exonerating testimony at a separate trial.” (*People v. Sánchez* (2016) 63 Cal.4th 411, 463-464 (*Sánchez*).)

Defendants may be tried together even when they are not jointly charged with all the same crimes. A joint trial may occur when there is a “joint charge as to [some] of the crimes and a common element of substantial importance in the commission of all of them.” (*People v. Spates* (1959) 53 Cal.2d 33, 36 [joint trial appropriate for robbery and attempted robbery even though seven additional felony counts charged solely against codefendant]; *People v. Stathos* (1971) 17 Cal.App.3d 33, 41, disapproved on other grounds in *In re Earley* (1975) 14 Cal.3d 122 [use of same gun in several crimes is “a common element of substantial importance” in their commission].) “We review the court’s denial of severance for abuse of discretion based on the facts as of the time of the ruling. If the court properly denied severance at the time, the reviewing court may reverse a judgment only if it finds that the joint trial caused gross unfairness that denied due process.” (*Sánchez, supra*, 63 Cal.4th at p. 464.)

In this case, the trial court was authorized to order a joint trial given the common charges against defendants on counts 4 and 5 for witness dissuasion and active gang participation. (§ 1098.) We agree with the court’s assessment that evidence relating to the second shooting incident would be relevant and admissible in a separate trial against Ricardo. Additionally, evidence relating to gang participation (police contacts, predicate crimes, expert testimony) would also be admissible. Nearly all the charged crimes were alleged to have occurred in a single 24-hour period in April, and police investigations of both shooting incidents quickly consolidated into the same

investigation. Testimony from key witness Adam not only assisted in establishing the second incident and the elements of witness dissuasion, but also in identifying the shooter in the first incident. Significant efficiencies could be achieved, and jury understanding would be enhanced, by holding a single trial covering all charges.

Moreover, the trial court considered the various factors that might support a discretionary order of separate trials. There was no incriminating confession that implicated Ricardo since Chico's statement to law enforcement was redacted.<sup>11</sup> Ricardo's trial counsel did not argue there was any likelihood of confusion, conflicting defenses, or possibility of exonerating testimony, and it does not appear to us that these factors applied.

That leaves the issue of prejudicial association, which Ricardo maintains required severance. "Prejudicial association might exist if 'the characteristics or culpability of one or more defendants [are] such that the jury will find the remaining defendants guilty simply because of their association with a reprehensible person, rather than assessing each defendant's individual guilt of the crimes at issue.'" (*Sánchez, supra*, 63 Cal.4th at p. 464.) Nonetheless, "[i]ndividuals who choose to commit crimes together are not generally entitled to shield the true extent of their association by the expedient of demanding separate trials." (*People v. Bryant, Smith & Wheeler* (2014) 60 Cal.4th 335, 383 (*Bryant*) [no improper guilt by association when evidence was clear as to each defendant's role in the criminal organization, and defendants had different roles].)

We are not persuaded the risk of prejudicial association was so great in this case as to necessitate separate trials. To be sure, evidence relating to

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<sup>11</sup> The jury was also instructed to consider Chico's statement only against him and not against Ricardo.

John’s murder would not be relevant in a separate trial against Ricardo, since he was not charged with murdering John or having any involvement in that crime. For the same reason, however, we are convinced the jury could separate and consider the murder-related evidence only as to Chico and the charge in count 1. The jury was instructed to separately consider the evidence as it applied to each defendant, and to decide each charge for each defendant separately (CALCRIM No. 203), and we presume the jury followed this instruction (*People v. Winbush* (2017) 2 Cal.5th 402, 457).

Importantly, there was no suggestion at trial that Ricardo was the shooter in either incident or morally responsible for Chico’s actions such that the jury would be motivated to find Ricardo guilty of a crime irrespective of the evidence. If anything, the jury heard that Ricardo said, “Don’t kill him” (referring to Paul), arguably distancing himself from Chico’s actions. The circumstances were such that the jury could fairly assess Ricardo’s guilt based on the evidence presented against *him*. (Cf. *People v. Chambers* (1964) 231 Cal.App.2d 23, 27-28 [unusual combination of events most likely left defendant fastened with “moral responsibility” for the actions of his codefendant employee].)

Ricardo argues that the prosecution improperly bolstered a “weak” case against him with a “strong” case against Chico. (See, e.g., *Calderon v. Superior Court* (2001) 87 Cal.App.4th 933, 941.) Based on our review of the record, we conclude the prosecution did not combine a weak case with a strong one; the strength of the evidence against defendants was roughly equivalent. Chico was certainly charged with more crimes that carried greater penalties. However, the evidence to establish the jointly charged crimes (and the second shooting) was essentially the same—mostly Adam’s testimony, corroborated by Paul, and gang participation evidence. Regarding

witness dissuasion, defendants were “equally incriminated” by Adam’s identification and testimony as to each defendant’s actions and statements on the night in question. (*Bryant, supra*, 60 Cal.4th at p. 383.)

Ricardo further asserts that, because his motion to sever was denied, at least two other things happened that operated to his detriment. First, he claims he decided *not* to plead guilty to count 6, the felon-in-possession charge. He posits that if he had been granted a separate trial, he would have pleaded guilty to count 6 and thus prevented the jury from hearing about his shotgun possession several days after the shooting incidents. Ricardo contends that evidence of the shotgun allowed the jury to infer he had a “dangerous and violent” character. Second, one officer briefly provided irrelevant testimony about seeing Ricardo *involuntarily* at a police station, which was found minimally prejudicial on a motion for mistrial because the court reasoned in part that the jury would already know of Ricardo’s convicted felon status from count 6. Ricardo claims the jury would not have known he was a convicted felon if he had pleaded guilty to count 6.

We reject Ricardo’s argument that reversal is warranted because of the aftereffects of the denied severance motion. “If the court’s joinder ruling was proper at the time it was made, a reviewing court may reverse a judgment only on a showing that joinder ‘“resulted in ‘gross unfairness’ amounting to a denial of due process.” ’ ” (*People v. Avila* (2006) 38 Cal.4th 491, 575.) There is no guarantee that evidence of Ricardo’s shotgun possession or his convicted felon status would have been excluded in a separate trial. In any event, the jury permissibly heard that he was actively participating in a criminal street gang, whose members routinely committed, and supported each other in committing, dangerous and violent crimes. Ricardo’s character was questionable irrespective of his prior and other felonies. Regarding his

motion for mistrial, the trial court immediately admonished the jury to disregard the officer's irrelevant testimony, which on this record was inconsequential. These circumstances did not render Ricardo's trial grossly unfair. (*Bryant, supra*, 60 Cal.4th at p. 379 ["[s]imply because the prosecution's case will be stronger if defendants are tried together, or that one defense undermines another, does not render a joint trial unfair"].)

In summary, we conclude Ricardo has failed to demonstrate an abuse of the trial court's discretion in denying his motion to sever. Similarly, there was no violation of his due process right to a fair trial.

B. *Substantial Evidence Supports Ricardo's Conviction for Dissuading a Witness*

Ricardo contends there is insufficient evidence to support his conviction on count 4 for witness dissuasion using threat of violence (§ 136.1, subds. (b)(1), (c)(1)).<sup>12</sup> He specifically argues that (1) he did not threaten Adam to prevent him from reporting Chico's crime, (2) he could not be guilty of witness dissuasion because, while he was not an accomplice to Chico's crime, Adam was, and (3) he could not be found guilty on an aiding and abetting theory.

"Section 136.1 prohibits, in part, any attempt to prevent or dissuade a witness to a crime from making a report of it to a police officer. (§ 136.1, subd. (b)(1).) As relevant here, 'witness' means 'any natural person . . . having knowledge of the existence or nonexistence of facts relating to any crime' or 'who would be believed by any reasonable person' to be such an individual. (§ 136, subd. (2).) Subdivision (c)(1) of section 136.1 punishes any person who knowingly and maliciously commits this offense by force or by an

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<sup>12</sup> Ricardo contends his dependent conviction on count 5 (§ 186.22, subd. (a)) must be reversed if count 4 is reversed. He asserts no independent basis to reverse count 5.



express or implied threat of force or violence.” (*People v. Pettie* (2017) 16 Cal.App.5th 23, 54.)

Witness dissuasion is a specific intent crime. (*Young, supra*, 34 Cal.4th at p. 1210.) “The circumstances in which the defendant’s statement is made, not just the statement itself must be considered to determine whether the statement constitutes an attempt to dissuade a witness[.]” (*People v. Wahidi* (2013) 222 Cal.App.4th 802, 806 (*Wahidi*).) If the defendant’s actions or statements are ambiguous, but reasonably may be interpreted as intending to achieve the consequence of dissuading the witness, the offense has been committed. (*People v. Ford* (1983) 145 Cal.App.3d 985, 989 (*Ford*).)

On our review for substantial evidence, we view the evidence in the light most favorable to the prosecution, presume every fact in support of the judgment, and do not resolve credibility issues or evidentiary conflicts. (*Wahidi, supra*, 222 Cal.App.4th at p. 806 [witness dissuasion committed following a physical altercation and defendant’s imploring witness to “settle this outside the court in a more Muslim manner”].)

In this case, the jury could reasonably infer, based on all the surrounding circumstances, that the charged offense was committed when Ricardo said, “if he [(Chico)] thinks someone is going to go to the cops, . . . he’ll kill ‘em.” Adam saw Ricardo and Chico beat up Whisper when Whisper got out of the car, apparently unwilling to go along with their plans. Adam observed that defendants were SSC gang members. He witnessed Chico’s shooting Paul, the recently used firearm in the SUV, and was warned by Chico to stay “cool.” Adam interpreted Ricardo’s statement as a threat that defendants would kill him if he went to police. It is of no consequence that Ricardo’s actions and words might have been interpreted as protective, i.e., to protect Adam from being killed by Chico. The jury did not accept that

interpretation in light of all the surrounding circumstances, and we see no basis to reverse the conviction. (*Young, supra*, 34 Cal.4th at pp. 1207, 1210-1211 [jury could infer specific intent based on defendant’s actions and words, “ ‘You snitched on me . . . and I should have killed you.’ ”]; *Ford, supra*, 145 Cal.App.3d at p. 989 [“ ‘You punk mother fucker, we’ll get you, you’ve got kids,’ ” viewed by jury as threat to prevent future testimony].)

Furthermore, the plain language of section 136.1 prohibits “every person” from attempting to dissuade a “witness”—regardless of whether the perpetrator or witness is an accomplice. (§§ 136, subd. (2), 136.1, subds. (b) & (c).) The statute simply draws no distinction for accomplices, and accomplices are undoubtedly people who can be witnesses. (See CALCRIM Nos. 334 & 335 [regarding accomplice testimony and corroboration requirement].) As Ricardo points out on appeal, the Legislature is aware of how to draw distinctions in the law relating to accomplices when it wishes to do so, and that was not done here. Ricardo also cites no authority to support that section 136.1 treats accomplices differently. Accordingly, he could be found guilty of dissuading Adam from reporting the underlying crime without regard to whether he and/or Adam were accomplices.<sup>13</sup>

C. *Remand Is Necessary for the Trial Court to Consider Whether to Strike Ricardo’s Prior Serious Felony Conviction*

When the trial court sentenced Ricardo, it was required to impose a consecutive five-year term for his serious felony prior conviction. (§§ 667, former subd. (a)(1), 1385, former subd. (b).) A subsequent legislative amendment now grants trial courts discretion to strike or dismiss the conviction for sentencing purposes in the “furtherance of justice.” (See Stats.

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<sup>13</sup> Because we affirm Ricardo’s conviction for witness dissuasion as a direct perpetrator, we have no need to address whether he could be convicted under an aiding and abetting theory of liability.

2018, ch. 1013, §§ 1-2, Senate Bill No. 1393; *People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) The amendment applies retroactively to nonfinal judgments. (*People v. Jimenez* (2019) 32 Cal.App.5th 409, 426; *Garcia*, at p. 971.)

Ricardo contends we should remand to give the trial court the opportunity to exercise its newly vested discretion under sections 667 and 1385. Although the Attorney General maintains the trial court is unlikely to strike the enhancement given that it already denied Ricardo’s *Romero* motion to strike,<sup>14</sup> he “reluctantly agrees” that “remand is probably the right choice.” (See *People v. Johnson* (2019) 32 Cal.App.5th 26, 69 [remanding under Senate Bill No. 1393 even though the trial court denied a *Romero* motion to strike a strike prior and indicated it would not strike a serious felony prior if it had the discretion to do so].) We agree and will remand for this limited purpose. We express no opinion on how the trial court should exercise its discretion.

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<sup>14</sup> Under *People v. Romero* (1996) 13 Cal.4th 497, 529-530, trial courts are authorized to strike a prior “strike” for sentencing purposes irrespective of a prosecutorial motion.

## DISPOSITION

The judgment against Chico is affirmed. Ricardo's case is remanded to the trial court so that it can consider whether to strike his prior serious felony enhancement. In all other respects, the judgment against Ricardo is affirmed.

DATO, J.

WE CONCUR:

HALLER, Acting P. J.

AARON, J.